No. 02-728

DEC 20 2002

IN THE

Supreme Court of the United States

BRANDON VALDIVIESO and DAVID KICKZALES,
on behalf of themselves and all others similarly situated,

Petitioners,

v.

ATLAS AIR, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The questions presented for review by the Court are more appropriately stated as the following:

1. Should the Supreme Court grant certiorari to review the Eleventh Circuit Court of Appeals' determination that a claim brought under the Fair Labor Standards Act in state court can be removed to federal district court?

2. Should the Supreme Court grant certiorari to review the Eleventh Circuit Court of Appeals' determination that the air carrier exemption to the Fair Labor Standards Act applies to the Petitioners, whose positions were integrally related to the transportation activities of an air carrier?

STATEMENT PURSUANT TO RULE 29.6

Respondent, Atlas Air, Inc., is a wholly owned subsidiary of Atlas Air World Wide Holdings, Inc.

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STATEMENT OF THE CASE

Petitioners' Statement of the Case is incomplete. Accordingly, Respondent sets forth a more complete statement of the undisputed facts relevant to the petition.

Atlas Air, Inc.

Atlas Air, Inc. ("Atlas Air" or the "Company") is a common carrier by air that owns, operates, and maintains a fleet of Boeing 747 freighter aircraft that it uses to transport cargo to over 100 cities worldwide. (Petitioner's Appendix ("Pet. App."), pp. 3a – 7a). The Company specializes in long-term outsourcing of its aircraft under "Aircraft, Crew, Maintenance, and Insurance" ("ACMI") contracts. (Pet. App., p. 3a). Atlas provides the ACMI for the flights it operates on behalf of its customers, while its customers bear all other operating expenses, including fuel, landing fees, and cargo and ground handling. (Pet. App., p. 3a).

Atlas Air provides its services primarily to other major international airlines and does so indiscriminately. (Pet. App., p. 3a). Each customer airline contracts with Atlas for one or more dedicated aircraft, allowing those airlines to expand their ability to meet their cargo transportation responsibilities without investing in additional equipment and personnel. (Pet. App., p. 4a). The Company solicits other entities that may need cargo transportation and accepts work from businesses that are not commercial airlines. (Pet. App., pp. 3a – 4a).

Atlas Air operates its own aircraft. Its customers provide ground transportation for the cargo shipped by Atlas Air, as well as handling agents who physically load and unload the

cargo. (Pet. App., pp. 3a – 4a). However, Atlas Air supervises the cargo loading process to ensure that all cargo is situated and secured for safe flight. (Pet. App., p. 4a).

Loadmaster Services

Loadmasters are trained professionals who specialize in air cargo transportation. (Pet. App., pp. 4a – 5a). Their duties are integrally related to Atlas Air's transportation activities. (Pet. App., p. 8a). Loadmasters ensure that each cargo load transported by the Company complies with the specific size and weight parameters for each aircraft and flight, that the load's distribution on the aircraft meets the aircraft's balance requirements, and that any hazardous materials are packaged and transported in compliance with all applicable regulations. (Pet. App., pp. 4a – 5a). The essential services provided by a loadmaster are the same whether the loadmaster is assigned to a specific flight or stationed on the ground at a particular airport. (Pet. App., p. 5a).

Petitioners' Services for Atlas Air[1]

Petitioner Brandon Valdivieso performed loadmaster services for Atlas Air from March 12, 1999 until April 10, 2000. (Pet. App., p. 5a). At times she was responsible for and traveled with individual flights. (Pet. App., p. 5a).

1. Atlas Air contends that Petitioners were independent contractors, not employees of Atlas Air. However, because the Company asserts that, even if they were employees, Petitioners would be subject to the air carrier exemption to the FLSA's overtime provisions, it has not yet raised the independent contractor issue with the district court, and the issue is not presently before this Court. Should this case be remanded to the district court, however, Atlas Air reserves the right to establish Petitioners' independent contractor status.

At other times, however, she provided loadmaster services only on the ground at the Miami, Florida airport. (Pet. App., p. 5a).

Petitioner David Kickzales provided loadmaster services to the Company from approximately August 1998 until May 2000. (Pet. App., p. 5a). He generally traveled with the loads for which he was responsible. (Pet. App., p. 5a). Neither Petitioner performed any services for Atlas Air that were not directly related to the Company's air transportation activities. (Pet. App., p. 5a).

REASONS FOR DENYING THE PETITION

I. The Eleventh Circuit's Decision Permitting Removal of an FLSA Claim does not Present Issues Warranting Certiorari.

Under 28 U.S.C. § 1441, federal claims brought in state court are generally removable. That section provides:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1441(a) (2000). Section 216(b) of the Fair Labor Standards Act ("FLSA" or the "Act") provides that an action to recover under the Act "may be maintained . . . in any Federal or State court of competent jurisdiction." 29 U.S.C. § 216(b) (2000). Petitioners assert that the phrase "may be

maintained" provides the express prohibition required by 28 U.S.C. § 1441 to prohibit removal of FLSA claims. The Eleventh Circuit rejected that assertion, affirming the district court's denial of the Petitioners' motion to remand the case to the state court in which it was originally filed. (Pet. App., pp. 5a – 6a).

Petitioners assert two arguments in support of reviewing the Eleventh Circuit's decision regarding the removability of FLSA claims: 1) the decision purportedly conflicts with the Eighth Circuit's opinion in *Johnson v. Butler Bros., Inc.*, 162 F.2d 87 (8th Cir. 1947); and 2) the decision purportedly contradicts congressional intent to disallow removal. Neither of those arguments, however, presents the kind of compelling reason required by Rule 10 of the Supreme Court Rules to grant a writ of certiorari.

A. There is No Real Split Among the United States Circuit Courts Regarding the Removability of FLSA Claims.

The Eighth Circuit's decision in *Johnson* does not create a conflict among the circuits because it has been superceded by statutory amendment and is easily reconciled with the Eleventh Circuit's decision in this case allowing removal. In 1947, in that purportedly conflicting opinion on whether FLSA claims may be removed to federal district court, the Eighth Circuit wrestled with the "may be maintained" language of Section 216 of the FLSA. *Johnson v. Butler Bros., Inc.*, 162 F.2d at 88-90. The court noted that the removal statute, as it existed in 1947, authorized "the removal of a 'suit of a civil nature . . . arising under the . . . laws of the United States . . . , of which the district courts of the United States are given original jurisdiction. . . .'" *Id.* Recognizing

that the district courts have original jurisdiction over an action under the FLSA, the court framed the question as whether the phrase "may be maintained" expresses congressional intent that an action, if brought in a state court, must remain there through final judgment. *Id.*

The Eighth Circuit concluded that the phrase is ambiguous, noting:

> This question as to the intent of Congress has given the federal district courts much difficulty. The result is that in some districts cases such as this may be removed and in other districts they may not be removed. For this unfortunate situation the courts are not to blame. It is attributable to *the failure of Congress clearly and accurately to express its intent.*

Id. at 89 (emphasis added). Ultimately, the court resolved that ambiguity in favor of disallowing removal. *Id.* at 89 – 90.

The following year, however, Congress clarified its intent regarding removal provisions in general, creating a presumption in favor of removal that the ambiguous language of Section 216 is insufficient to overcome. In 1948, Congress amended the general removal statute to provide that civil actions may be removed "[e]xcept as otherwise *expressly provided* by Act of Congress." 28 U.S.C. § 1441(a) (2000) (emphasis added). As the Eighth Circuit held in *Johnson*, the FLSA does not "clearly and accurately . . . express" an exception to removability. *Johnson*, 162 F.2d at 89. Thus, the 1948 amendment disallowed *Johnson* – style interpretations of ambiguous removal language and superceded the Eighth Circuit's decision in *Johnson*.

The other circuits that have considered this issue agree that the 1948 amendment precludes the result reached by the Eighth Circuit in *Johnson*. *See Cosme Nieves v. Deshler*, 786 F.2d 445, 451 (1st Cir. 1986); *Breuer v. Jim's Concrete of Brevard, Inc.*, 292 F.3d 1308, 1309 (11th Cir. 2002). Since 1948, even district courts within the Eighth Circuit have recognized that *Johnson* is no longer binding authority, holding that FLSA claims brought in state court can be removed. *See Niswander v. Paul Hardeman, Inc.*, 223 F. Supp. 74 (E.D. Ark. 1963); *Waldermeyer v. ITT Consumer Fin. Corp.*, 767 F. Supp. 989 (E.D. Mo. 1991). Accordingly, *Johnson* does not create a true, current conflict among the circuits on the issue of whether FLSA claims may be removed.

Petitioners concede that *Johnson* is the only circuit level decision at odds with the Eleventh Circuit opinion on the removal issue. Since the 1948 amendment, every circuit court that has expressed a view on whether Section 216 of the FLSA prohibits removal has concluded that it does not. Both the First and Eleventh Circuits have squarely held that FLSA claims are removable. *See Cosme Nieves v. Deshler*, 786 F.2d 445, 451 (1st Cir. 1986); *Breuer v. Jim's Concrete of Brevard, Inc.*, 292 F.3d 1308, 1309 (11th Cir. 2002). Likewise, the Fifth Circuit and the Ninth Circuit have suggested that they will uphold removal of an FLSA claim when presented with the issue. *See Baldwin v. Sears, Roebuck & Co.*, 667 F.2d 458, 460 (5th Cir. 1982) (holding that ADEA claims, which are enforced in accordance with Section 216 of the FLSA, are removable and recognizing the impact of the 1948 amendment on the removal issue); *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1196 (9th Cir. 1988) (noting in dicta that the FLSA contains "no limitation on removal, express or otherwise"). Thus, all of the known post-amendment

decisions by the circuit courts concerning the removability of FLSA claims are in agreement, and there is no split among the circuits warranting this Court's review. Likewise, as Petitioners concede, a developing majority of the federal district courts have held that FLSA claims are removable. Any remaining disagreement among the district courts is more expeditiously handled at the circuit court level.

B. The Eleventh Circuit's Decision Regarding Removal of FLSA Claims is not Contrary to Congressional Intent.

Petitioners argue that this Court should review the Eleventh Circuit's decision because legislative history demonstrates that the FLSA was intended to prohibit removal of claims that are initiated in state court. However, Petitioners have cited no legislative history showing that Congress ever discussed the issue of removability of FLSA claims when passing the law. Rather, they rely on the legislature's editing of an earlier draft of the Act, replacing language granting state and federal courts concurrent jurisdiction over FLSA claims with the present, more concise language permitting maintenance of an FLSA claim in any court of competent jurisdiction. However, replacing the concurrent jurisdiction clause with the term "maintain" hardly amounts to the clear expression of congressional intent required to prohibit removal. Although one possible definition of the term "maintain" is "to continue," another, equally valid definition is "to assert." *See Black's Law Dictionary* 964 (7th ed. 1999) (defining "maintain" as "to continue (something)" or "to assert (a position or opinion)").[2]

2. Petitioners' reliance on *Maloy v. Friedman*, 80 F. Supp. 290 (N.D. Ohio 1948), for the proposition that this Court interpreted (Cont'd)

Moreover, as this Court has recently noted, the best evidence of congressional intent is the plain language of the text itself. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 895 (2000). The plain language of the general removal statute specifically states that any exception to removal must be "expressly provided by Act of Congress." 28 U.S.C. § 1441(a) (2000). As the First Circuit has emphasized:

> Section 1441(a) explicitly states that an express provision by Act of Congress is required to preclude the right to removal. We think the words "expressly provided" must be construed to mean exactly that.

Cosme Nieves, 787 F.2d at 451.

The FLSA simply does not meet that unambiguous requirement. Again, the language of Section 216 of the FLSA allowing an action to be maintained in any court of competent

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(Cont'd)
"maintain" to mean "continue" before the FLSA was passed is unpersuasive. One of the cases cited by the *Maloy* court in support of that proposition is *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373 (1933). As another court has noted:

> The Court in [*Rose*] dealt with the word "maintain" in a wholly different context, and only found that maintain "mean[s] no less than to prosecute with effect." Thus, though the Court found that "maintain" meant, at the very least, "to prosecute with effect" nowhere did it say that it could only mean "continue," or that it could not have other meanings, such as "assert."

Roseman v. Best Buy Co., 140 F. Supp. 2d 1332, 1338 n.10 (S.D. Ga. 2001).

jurisdiction is ambiguous and does not create an express exception to the removal statute. Likewise, even if the legislative history of the FLSA could be interpreted as an unambiguous expression of congressional intent to disallow removal, it does not amount to an "Act of Congress," as required by Section 1441(a).

Finally, Petitioners argue that allowing removal of FLSA claims violates the congressional goal of making such actions easier for employees to prosecute. However, by enacting Section 1441(a), Congress clearly expressed a different policy – one of allowing defendants to remove federal claims to federal courts. When Congress has chosen to abandon this policy in favor of a competing policy, such as the one Petitioners assert here, it has done so in clear and unambiguous terms. Such express prohibitions against removal are readily found in other statutes. For example, in 28 U.S.C. § 1445, Congress listed certain federal claims that may not be removed.[3] However, Congress did not see fit to

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3. 28 U.S.C. § 1445 (2000) provides:

> (a) A civil action in any State court against a railroad or its receivers or trustees, arising under section 1 – 4 and 5 – 10 of the Act of April 22, 1908 (45 U.S.C. 51-54, 55-60), *may not be removed* to any district court of the United States.
>
> (b) A civil action in any State court against a carrier or its receivers or trustees to recover damages for delay, loss, or injury of shipments, arising under section 11706 or 14706 of title 49, *may not be removed* to any district court of the United States unless the matter in controversy exceeds $10,000, exclusive of interest and costs.

(Cont'd)

include FLSA claims in that list. Similarly, the Securities Act of 1993, 15 U.S.C. § 77v(a), expressly prohibits removal to federal court. Thus, if Congress's overriding goal was to allow plaintiffs to have complete control over where FLSA claims are litigated, it would have created a removal exception for those claims in clear and unambiguous language, as it has done for other types of claims. Congress has not acted to create a clear expression of such an intention in the more than five decades since adopting Section 216. Thus, allowing removal of FLSA claims brought in state court does not contradict any real expression of congressional intent, and the Eleventh Circuit's decision permitting removal of an FLSA claim does not present the necessary compelling reasons for this Court's review.

II. The Eleventh Circuit's Decision Holding Petitioners Subject to the Air Carrier Exemption to the Overtime Provisions of the FLSA does not Warrant Review by This Court.

Section 207 of the FLSA requires covered employers to pay overtime premium compensation to covered employees who work in excess of forty hours in a work week. The FLSA also contains specific exemptions to the Section 207 overtime requirements, including an exemption, commonly referred to as the air carrier exemption, for "any employee of a carrier by

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(Cont'd)

> (c) A civil action in any State court arising under the workmen's compensation laws of such State *may not be removed* to any district court of the United States.
>
> (d) A civil action in any State court arising under section 40302 of the Violence Against Women Act of 1994 *may not be removed* to any district court of the United States.

(emphasis added).

air subject to the provisions of title II of the Railway Labor Act." 29 U.S.C. § 213(b)(3) (2000). Title II of the Railway Labor Act ("RLA") governs:

> [E]very common carrier by air engaged in interstate or foreign commerce . . . and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

45 U.S.C. § 181 (1994).

The Eleventh Circuit found that Atlas Air is a common carrier by air and that the air carrier exemption applied to the Petitioners because they "do not dispute that their positions as loadmasters are integral to the transportation of cargo." (Pet. App., p. 8a). Petitioners argue that, contrary to the unambiguous language of the statute, the exemption should apply only to pilots, and they urge this Court to review the Eleventh Circuit's decision based on one senator's vague reference to the exemption in the legislative history. That reference, however, does not present a compelling reason to grant a writ of certiorari on this issue.

A. The Eleventh Circuit's Holding is Consistent with Every Federal Court Decision on this Issue.

In the more than sixty years since the air carrier exemption was enacted, no federal court has given credence to Petitioners' argument that the exemption should apply only to pilots. Courts have consistently held that title II of the RLA, and the corresponding air carrier exemption, apply broadly to a carrier's workforce, so long as the employee's

activities bear "more than a tenuous, negligible and remote relationship to the transportation activities." *Northwest Airlines v. Jackson*, 185 F.2d 74, 77 (8th Cir. 1950). Indeed, like the Eleventh Circuit in this case, every other federal court that has analyzed the applicability of the air carrier exemption has done so on the basis of the employee's relationship to the employer's transportation activities. *See Verrett v. The Sabre Group, Inc.*, 70 F. Supp. 2d 1277 (N.D. Okla. 1999) (holding that employees of service that provided customized information management and computer reservations for airlines were subject to the air carrier exemption because their functions were integrally related to air transportation); *Slavens v. Scenic Aviation, Inc.*, No. 99-4197, 2000 WL 985933 (10th Cir. Jul. 18, 2000) (unpublished opinion) (holding that medical supervisor of air ambulance company was subject to the air carrier exemption because he supported transportation activities); *Pan Am. World Airways, Inc. v. United Bhd of Carpenters & Joiners*, 324 F.2d 217 (9th Cir. 1963) (holding that house keepers at a nuclear test site were not subject to the exemption because their work was not sufficiently related to transportation activities); *Marshall v. Pan Am. World Airways, Inc.*, No. 75-394-ORL-CIV, 1977 WL 1772 (M.D. Fla. Aug. 8, 1977) (holding that the issue in determining whether employees are subject to the air carrier exemption is their relationship to their employer's transportation activities); *Northwest Airlines v. Jackson*, 185 F.2d 74 (8th Cir. 1950) (same); *Roland v. United Airlines, Inc.*, 75 F. Supp. 25 (D. Ill. 1947) (same).

Thus, every federal court that has considered this issue in the more than sixty years since the inception of the air carrier exemption has agreed that the exemption applies to employees whose work relates to transportation activities. Clearly, the Eleventh Circuit's decision in conformity with that long, consistent line of holdings does not raise unique or compelling issues warranting this Court's time and resources.

B. The Eleventh Circuit Correctly Interpreted the Plain, Unambiguous Language of the Statute.

Petitioners argue that the air carrier exemption's legislative history justifies a scheme of statutory interpretation that is inconsistent with the exemption's plain meaning and every reasoned decision on this issue. The Eleventh Circuit rejected that argument, holding that "Courts cannot . . . consider legislative history when the statutory language is unambiguous." (Pet. App., p. 8a). That holding was undeniably correct.

The language of the air carrier exemption is clear and unambiguous. The FLSA exempts "*any employee* of a carrier by air subject to the provisions of title II of the Railway Labor Act." 29 U.S.C. § 213(b)(3) (2000) (emphasis added). Moreover, the RLA expressly extends its coverage beyond pilots, subjecting "every air pilot *or other person who performs any work as an employee*" to its provisions. 45 U.S.C. § 181 (1994) (emphasis added). Clearly, Congress did not intend to limit the RLA or the corresponding air carrier exemption to pilots. To the contrary, the unambiguous language reveals that both the Railway Labor Act and the air carrier exemption to the FLSA cover many other types of employees.

As this Court has emphasized:

> We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."

Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-254 (1992) (*quoting Rubin v. United States*, 449 U.S. 424, 430 (1981).

Likewise,

> Floor statements from two Senators cannot amend the clear and unambiguous language of a statute. We see no reason to give greater weight to the views of two Senators than to the collective votes of both Houses, which are memorialized in the unambiguous statutory text.

Barnhart v. Sigmon Coal Co., 534 U.S. 438, 457 (2002). Thus, the Eleventh Circuit properly ended its inquiry upon determining that, under the statute's plain language, the Petitioners are subject to the air carrier exemption.

Petitioners object to the Eleventh Circuit's "plain language" analysis, citing authority for the proposition that courts must look at what words meant when Congress originally used them, not at what that language means in modern times. That rule of judicial interpretation, however, is inapplicable here. Petitioners do not argue that the language of the air carrier exemption was subject to a different meaning when it was enacted. Nor do they argue that the plain language of the exemption has a narrower meaning when interpreted within its original context. Instead, they argue that, in drafting an exemption that applies to "every air pilot or other person who performs any work as an employee," Congress actually meant to limit the exemption to pilots and no one else. No rule of judicial interpretation allows a court to find that Congress meant to do the exact opposite of what it has plainly legislated.

Furthermore, the legislative history cited by the Petitioners does not support their argument that Congress intended the air carrier exemption to apply only to employees whose hours are otherwise regulated. Senator Black's

comments relate to all of the various FLSA exemptions for employees in transportation industries. While those observations demonstrate that Congress wanted to avoid duplicative regulation of transportation employees, they do not in any way support Petitioners' assertion that such desire was Congress's *only* motivation in passing the transportation exemptions. Indeed, the Department of Labor's explanation for those exemptions cited by Petitioners demonstrates that the exemptions were added to the FLSA because of testimony by labor organizations representing transportation workers regarding "the peculiar needs of their industry" as well as the existence of other governmental regulation. (*See* Petitioners' brief, p. 17 n.19). Clearly, Congress was concerned about more than duplicative regulation when it passed the transportation exemptions.

Moreover, the transportation exemptions to which Petitioners analogize the air carrier exemption demonstrate that those exemptions, including the exemption for air carriers, were never intended to apply only to employees whose hours are otherwise regulated. This Court has recognized that the motor carrier exemption applies to employees of motor carriers even if their hours are not subject to other limitations. *See Southland Gasoline Co. v. Bayley*, 319 U.S. 44 (1943) (applying motor carrier exemption to employees whose hours were not regulated by the Secretary of Transportation); *Levinson v. Spector Motor Serv.*, 330 U.S. 649 (1947) (holding that the issue in determining whether employees are subject to the motor carrier exemption is not whether their hours are otherwise regulated). Likewise, the railway exemption applies to every employee of a rail carrier, even those employees whose hours are not otherwise regulated. *See McComb v. Union Stock Yards & Transit Co.*, 168 F.2d 375 (7th Cir. 1948) (holding stockyard watchmen subject to the railway exemption).

Finally, the air carrier exemption is only one of more than twenty exemptions to the FLSA's overtime requirements. 29 U.S.C. § 213(b) (2000). The majority of those exemptions apply to employees whose hours of service are not otherwise subject to limitation. For example, employees who process maple sap into sugar or syrup, prepare fruits or vegetables for transportation, plant trees, or work in a motion picture theater are exempt from the FLSA's overtime requirements. 29 U.S.C. § 213(b) (2000). The existence of those exemptions contradicts Petitioners' assertion that Congress intended to exempt from the FLSA only those employees whose hours of service are otherwise regulated.

Thus, the Eleventh Circuit's decision in this case correctly interpreted the plain language of the air carrier exemption and is not contrary to congressional intent. As a result, it does not create compelling reasons for review by this Court.

CONCLUSION

This case does not present compelling reasons for review on certiorari. Accordingly, the petition should be denied.

Respectfully submitted,

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